ACQUIRING STORY RIGHTS
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Unless your screenplay is based on either a story of your own creation or on a non-fictional event based on your own research of public documents, one of the first steps you will need to take to develop a feature film or made-for-television movie is to acquire the underlying story rights. Before you spend time writing and editing the screenplay, looking for production financing or lining up talent, you should make certain you have the right to use the story you want to tell in your film.

If your screenplay will be based on a book, magazine article or other published work, this will involve optioning or purchasing the film rights from the author (or the publisher or other owner if it is a work-made-for-hire). If it is based on a life story, you will need to acquire the life story rights from the subject individual. If you are basing your screenplay on a story reported in the news or on a person’s public life, you may not need to acquire the story rights so long as you use your own research to create the screenplay. However, even in a non-fiction context, acquiring the story rights may be a way to obtain cooperation from the author of a published work or the individual whose life story you want to use. Such agreements can also help avoid defamation and invasion of privacy claims in certain situations.

Although a great deal of creativity can be used to structure acquisitions of story rights, there are some standard practices that are useful to understand when negotiating these agreements. Story rights can be purchased outright or can be optioned for a period of time. Typically, producers prefer to option story rights because it lowers their initial out-of-pocket costs and reduces their up-front risk. Most producers either do not have, or are unwilling to spend, lots of money to buy the story rights at the outset. The main reason is that there are many hurdles to overcome in getting a movie produced, not the least of which are writing a satisfactory screenplay and lining up adequate financing. If a film can’t be produced, the producer may have bought something she doesn’t need. Of course, there are situations where a producer may want to buy out the rights to assure control of the property. Similarly, while some authors may prefer to sell their movie rights outright, others see advantages to the option to purchase arrangement. For example, the option may give the author assurance that either the movie rights will be exploited or relinquished by a certain date (this is called a “reversion of rights” clause). Option payments are usually not refundable although in some cases they are applied to the purchase price. It is not uncommon for an author to collect the option payment and then, if the option has not been exercised during the option period and it expires, to option the rights to another producer.

An option to purchase agreement typically consists of two documents, an option contract and a purchase agreement, although sometimes the provisions of each are contained in a single document. In either case, it is very important to negotiate the terms of the purchase agreement simultaneously with the terms of the option. An option contract that does not include the specific terms for the purchase is a worthless option: all it gives the producer is the right to negotiate the terms of the purchase at a later date. The owner of the story rights is under no obligation to sell the property unless the essential terms of the purchase (buyer and seller, purchase price, rights being acquired, offer and acceptance) are included either in the option or in an attached purchase agreement.

A typical option to purchase story rights contains a number of key provisions. The option will give the producer a period of time, usually a year or two, during which the producer has the exclusive right to purchase the story rights. Often a provision is included to allow the producer to extend the option for an additional period (often for another year) at the producer’s discretion. This lowers the producer’s up-front costs and gives the producer some flexibility to evaluate the viability of the project as it goes forward. If the producer does not exercise the option within that period, the option expires and all rights revert back to the author.

Compensation for the option and purchase typically consists of three separate forms of payment. First are the initial option payment and any payments due to extend the option. These option payments are “real” money from the producer’s perspective; that is, the money comes directly out of the producer’s own pocket. As such, producers typically want to keep the option payments as low as possible. Authors can usually be flexible about the option payments as well. Those that aren’t may need to be reminded that without the option, the story rights may not be exploited, and if they are not exploited, they will not generate any income to the author at all. One rule of thumb is
that the option payment should be equal to ten percent of the purchase price. However, optioning for a nominal sum is not unusual. Since there are often costs associated with negotiating the option (legal fees incurred by the author to review the agreement, for example), one way to gauge the reasonableness of the option payments is whether they adequately compensate the author for the costs incurred in granting the rights, with perhaps a little additional cash so that the author feels like she has received something for giving up the optioned rights for a period of time.

The second form of compensation is the purchase price, made when the option is exercised and the story rights are purchased. Typically the purchase price is structured as the greater of a set minimum payment or a percentage of the budget for the production. Sometimes a cap is included. The purchase price may vary depending on how the story rights will be exploited. For television, this is usually based on the length of the final production. For example, the purchase price might be the greater of $150,000 or ten percent (10%) of the budget (but not more than $300,000) for a full-length feature film, and $150,000 for a television movie or mini-series of not more than two hours. If the television movie or mini-series runs more than two hours, additional payments may be required. Sometimes, option payments already made are credited to the purchase price. The option to purchase agreement often will include provisions allowing for adjustments in the event the rights are exploited in alternative or additional media. From the producer’s perspective, the purchase price becomes part of the budget. The viability of the project will in part depend on the purchase price and will affect the ability to raise financing for the project, but since it doesn’t represent out-of-pocket costs for the producer, he may be willing to compensate the author for a lower option price by offering a higher purchase price. From the author’s perspective, the purchase price may be the only money the author will realize for the sale of the story rights so she will want to bargain for as high a purchase price as possible.

A third form of compensation is the contingent or "back-end" payment. For a theatrical film, this usually takes the form of a net profits participation in a theatrical release of the film, expressed as a small percentage (perhaps 5%) of the producer's net. For made-for-television movies or mini-series, it takes the form of a royalty payment. Royalty payments are usually expressed as a fixed sum per hour or half hour episode. Contingent payments will affect how much a producer realizes from a successful project. However, if a project is successful, the producer probably will not mind if the author shares in this success. Since the net profits or royalty is speculative, it is a relatively painless way for a producer to allow an author to share in the potential success of the production.

Obviously the tension between these three forms of compensation can provide an opportunity for both producer and author to find a common point from which to share the risks and rewards of exploiting the story rights. For example, a low option price will make it easier for a producer to begin the process of developing the project. A reasonable purchase price will balance the budgetary and financing concerns of the producer with the author’s desire for fair compensation. The contingent compensation can provide the author with assurance that, if the production is successful, she will be able to participate in that success.

Another essential element of an option contract is the rights that are granted. Sometimes all rights (the entire copyright) are sold. More typically, only limited rights, on an exclusive or non-exclusive basis are sold. For film and television productions, the grant of rights typically includes all theatrical motion picture and television rights including all cable, syndication and pay-per-view rights, video, DVD, music, interactive and publishing rights, and all incidental and subsidiary rights including merchandizing and musical rights. Often, the owner will reserve certain specified rights, such as sequel, radio and audio book rights, live theatrical stage rights and limited merchandizing rights. From the producer’s perspective, the grant of rights is all-important: it is what he is buying. As such, it is crucial to review the grant of rights carefully to ensure it meets the producer’s needs for financing, production and distribution.

Another important grant from the producer’s perspective is the right to make alterations to adapt the work for a film or television production. Authors are often concerned that a producer will make changes that ruin the work or embarrass the author. While some countries recognize "moral rights" in artistic works, except in certain statutory situations under the Visual Artists Rights Act the United States does not. Often a compromise is reached whereby the producer agrees to consult with the author on major plot and character changes.

Warranties and indemnifications are also found in most option contracts. Typically the author must warrant that he is the sole owner of the work, that the work is original and will not defame or invade anyone’s privacy, and that there are no claims or lawsuits involving the work. When an option is involved, the author will also typically warrant that the
rights being optioned will not be otherwise sold or licensed during the option period. In addition to these warranties, the author typically will be asked to indemnify and defend against any claims made against the producer for breach of any of the warranties made by the author. The author may also be required to provide proof of copyright ownership. The representations and warranties provisions need to be taken very seriously by both parties during the negotiation. In the process of negotiating, these “reps and warranties” restrictions on an author’s ability to grant certain rights may come to light. The author may also become responsible for clearing certain rights or face liability under certain circumstances. Although producers can rely on reps and warranties to a certain degree, they should also do their own due diligence investigation and consider obtaining appropriate insurance coverage to protect themselves in the event a claim is brought.

Other typical provisions of an option contract include the right to use the name and likeness of the author for promotional purposes in connection with the production, the right to assign the option to a third party (typically another producer or studio), screen credit for the author, force majeure provisions, a provision stating that the producer is not obligated to actually produce the film, a right of reversion if the film is not produced, and various additional miscellaneous provisions.

Acquiring story rights is often the first step in developing a film, made-for-television movie or other creative work. Since the story is the foundation on which a successful production is built, it is important to secure the underlying story rights at the outset.